IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PIEDMONT STATE BANK, et al.,	)	
	)	
Plaintiffs-Appellees,	)	Nos. 96-5347
v.	)	96-5348
	)	96-5349
NATIONAL CREDIT UNION ADMINISTRATION, et al.,	)	96-5350
	)	96-5351
	)	96-5352
Defendants-Appellants	)	
	)	
NATIONAL ASSOCIATION OF FEDERAL CREDIT UNIONS,	)	
	)	
Defendant-Appellant.	)	

DEFENDANTS' RENEWED MOTION -- BASED ON THE RECENT GRANT OF CERTIORARI -- FOR A STAY PENDING SUPREME COURT REVIEW

INTRODUCTION

1. On July 30, 1996, this Court declared invalid the National Credit Union Administration's ("NCUA") policy that interpreted the "common bond" requirement in 12 U.S.C. § 1759 to permit establishment of credit unions consisting of "multiple occupational . . . groups" so long as each group had its own common bond and was within the operational area of the credit union's offices. First National Bank & Trust Co. v. NCUA, 90 F.3d 525 (D.C. Cir. 1996). The Court remanded the case "for entry of declaratory and injunctive relief, consistent with the foregoing opinion, concerning the NCUA's 1989 and 1990 approvals of certain applications filed by [the AT&T Family Federal Credit Union]," id. at 531; and it denied rehearing on October 23, 1996.

On NCUA's behalf, the Acting Solicitor General filed a petition for a writ of certiorari from this decision one month later, on November 26, 1996. By filing the petition two months early, the Acting Solicitor General had hoped to secure the Supreme Court's consideration of the decision before the end of the Supreme Court's 1996 Term. The Supreme Court has now granted our petition for certiorari, First National Bank and Trust Co. v. NCUA, 90 F.3d 525 (D.C. Cir. 1996), cert. granted, 65 U.S.L.W. 3580, 3835 (U.S. Feb. 24, 1997) (No. 96-843);[1] but because certiorari was not granted until February 24, 1997, consideration and disposition of the case before the next Term is effectively foreclosed.

In light of the Supreme Court's decision to review this Court's 1996 decision, the NCUA renews its request for a complete stay of the district court's orders of October 25 and October 31, 1996, preliminarily and permanently enjoining the NCUA and defendant-intervenors Credit Union National Association ("CUNA") and National Association of Federal Credit Unions ("NAFCU") (collectively "defendants") from acting in concert to approve new select employee groups or enroll new members of existing occupational groups that do not share a common occupational bond

[1] At the same time, the Supreme Court also granted Intervenor Credit Union National Association's ("CUNA") petition for a writ of certiorari. (No. 96-847).

with a credit union's core membership. Memorandum and Order (Oct. 25, 1996) at 8; Memorandum and Order (Oct. 31, 1996) at 2-3.[2]

2. Defendants filed this appeal from the district court's October 25 injunction on November 15, 1996, and sought a stay of the injunction from the district court. After the district court denied the stay on December 4, 1996, we requested that this Court grant a complete stay of the district court's order, pending appeal and final disposition of the NCUA's petition for certiorari. Alternatively, we requested a partial stay of that portion of the district court order banning the enrollment of new members from previously approved employee groups.

On December 24, 1996, this Court granted our request in part. It ordered that "so much of the October 25, 1996 and October 31, 1996 district court orders that bar a credit union from enrolling new members of existing occupational groups that do not share a common occupational bond with the credit union's core membership, be stayed pending appeal, or resolution of the petitions for certiorari * * *."

3. The Supreme Court's grant of certiorari in this case has shifted the equities dramatically in favor of a full stay. Therefore, for the reasons set forth below, this Court should reconsider our request for a complete stay pending final

[2] In this memorandum, we refer to these two orders collectively as "the October 25th order."

disposition of this case by the Supreme Court. We otherwise agree with plaintiffs that no further proceedings are warranted with respect to these appeals until the Supreme Court issues its decision.

SUMMARY OF ARGUMENT

In our previous stay papers, we pointed out that the district court's October 25th order had serious adverse consequences for multiple occupational group credit unions and members of the public. The district court's injunction forced credit unions to turn away new members, lose capital investments, and damage their relationships with sponsoring employers. In turn, members of the public -- individuals who, for 14 years until October 25, 1996, possessed the right to join a credit union -- were left without access to affordable financial services, and many small businesses are left without a significant element of their employee benefits packages. Furthermore, we showed that the district court's injunction had a disproportionate impact on workers with relatively low incomes and on very small businesses.

In seeking a stay of the district court's injunction from this Court, we noted that the Government had filed an expedited petition for certiorari in the First National case, hoping to secure Supreme Court review of the NCUA's multiple group policy before the end of the current Term. In response, this Court granted us partial relief, staying only that portion of the district court injunction

that barred credit unions from enrolling new members of existing occupational groups that do not share a common occupational bond with a credit union's core membership, pending disposition of NCUA's certiorari petition.

In granting certiorari, the Supreme Court has altered the balance of factors weighing in favor of a complete stay. First, there is a greater likelihood that NCUA will succeed on the merits since the outcome of the litigation no longer rests on this Court's previous determination of the questions now before the Court.

Second, the fact that final disposition of the litigation will not occur this Supreme Court Term, as we had hoped, significantly shifts the balance of harms in favor of a complete stay. (We read the Court's prior order granting a partial stay as extending until final disposition of the case by the Supreme Court.)[3] The survival of many occupational federal credit unions generally depends on their ability to diversify their field of membership by accepting new select employee groups. Consequently, the longer such credit unions are prevented from adding new employee groups to their existing charters, the greater the harm they and members of the public will suffer.

[3] Our experience is that when the Supreme Court grants certiorari in a case like this one at this point in the Term, a final decision will not be issued until the following winter, or early 1988.

By contrast, a complete stay will not seriously increase the harm to the plaintiffs' member banks, who never have demonstrated that any bank, or the banking industry, is suffering significant harm due to the multiple group policy. Indeed, even assuming that some new credit union members will have given up accounts with banks, the impact of such lost customers on any particular bank is minimal. Thus, plaintiffs here can far more easily weather a complete stay pending Supreme Court review than the credit union industry can withstand a decline in membership, employer-sponsored groups, and earnings.

For these reasons, and as explained below, we request this Court to grant a full stay of the district court's October 25th order.

ARGUMENT

DEFENDANTS ARE ENTITLED TO A FULL STAY PENDING SUPREME COURT REVIEW OF THE FIRST NATIONAL CASE.

In determining whether to grant a stay pending appeal, this Court considers four factors: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985) (citing Washington Metro. Area Transit Comm'n ("WMATC") v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977)); accord Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

In granting a stay of that portion of the district court's orders that "bar[red] a credit union from enrolling new members of existing occupational groups that do not share a common occupational bond with the credit union's core membership," this Court implicitly recognized that the government had presented a serious legal question regarding the NCUA's construction of the Federal Credit Union Act ("FCUA"), and that the harm to the nation's credit unions from being unable to add new members from existing select employee groups outweighed any harm to the plaintiffs' member banks. Now that the Supreme Court has granted our petition for certiorari, the balance of factors to be

considered in determining whether a complete stay is justified has shifted decidedly in favor of the defendants as well.

A. NCUA's Likelihood of Success On The Merits Has Improved.

Before certiorari was granted, this Court's previous rulings on standing and on the merits gave the plaintiffs a decided edge on the question of likelihood of success. In our previous stay papers, we asserted that the NCUA's interpretation of the FCUA's "common bond" requirement, and our contention that the plaintiff banks lacked standing to enforce the requirement, nevertheless presented serious legal questions that, given the harm to credit unions and the public, warranted a stay even if the likelihood of success on the merits of our appeal was low. See Reply to Pltffs' Memo. in Opp. to Defts' Mot. for a Stay (Dec. 23, 1996) at 2-3.

In granting certiorari, however, the Supreme Court not only confirmed that it too considers both the standing and merits questions to be substantial, but it altered the calculus of probability of success. The outcome of the litigation no longer depends on this Court's previous determinations on these questions. Rather, it now depends on the Supreme Court's analysis of these issues.

B. The Balance of Harm Has Shifted In Favor Of a Complete Stay.

Perhaps more important, the fact that the Supreme Court will not finally resolve the questions presented by our certiorari petition before the next Supreme Court Term alters the balance of harms to the parties. The partial stay only permits federal credit

unions to continue enrolling new members of existing occupational groups. It does not affect that portion of the district court injunction barring credit unions from adding new occupational groups. But, as we noted in our previous papers, to survive as viable institutions, occupational federal credit unions often have no alternative but to diversify their field of membership by accepting new select employee groups. Third Declar. of David M. Marquis (Nov. 14, 1996) at ¶ 5 (attached). The longer the period during which credit unions are prevented from adding new select employee groups to their existing charters, the greater the harm they and members of the public will suffer. Thus, the partial stay places credit unions at unnecessary risk of financial harm due to a downturn in a single industry or sector of the economy.

In addition, many federal credit unions have relied upon NCUA's 14-year multi-group field of membership policy to invest substantial sums to create an infrastructure to support select group expansion. Millions of dollars have been spent on branch offices, data processing, personnel and other enhancements with the reasonable expectation that credit unions would be permitted to serve additional select employee groups. See Third Marquis Declar. at ¶¶ 11-12. Over the time needed by the Supreme Court to resolve this case, if credit unions are prevented from adding new groups, thereby losing the ability to sustain the cost of these

enhancements, they will be faced with additional costs and a deteriorating income stream.

Finally, the public interest also suffers because credit unions are prevented from providing financial services to millions of small businesses and low-income groups that cannot form their own viable credit unions. For example, 99% of the 6.18 million businesses existing in 1990 employed fewer than 500 employees. U.S. Bureau of the Census, Statistical Abstract of the United States: 1993 (113th ed.) at 538. The NCUA, however, does not charter new credit unions with fewer than 500 members because experience has shown that groups of fewer than 500 members cannot sustain an economically viable credit union. Declar. of David Marquis (Sept. 9, 1996) at ¶ 6 (First Marquis Declar.) (attached). Unless the Court broadens its stay to permit credit union select group expansion, many businesses with fewer than 500 employees will be harmed. Thus, the absence of a broader stay would frustrate Congress's purpose in enacting the FCUA to expand access to credit unions by persons of limited means. See S. Rep. No. 555, 73d Cong., 2d Sess. 1-3 (1934); H.R. Rep. No. 2021, 73d cong., 2d Sess. 1-2 (1934).

Furthermore, until October 1996, when the district court injunction halted the policy, NCUA had granted authority to 73 federal credit unions to open branches in distressed neighborhoods to make their services available to a potential 1.4 million low-

income residents. Testimony of Norman E. D'Amours, Chairman, NCUA, before the Subcomm. on Fin. Insts. and Consumer Credit of House Comm. on Banking and Fin. Servs. at 12 (Feb. 26, 1997) (attached).[4] Several of these credit unions refurbished empty buildings and moved into abandoned bank buildings. Ibid. The court injunction has forced the NCUA Board to place on hold applications from 14 additional federal credit unions in states such as New York, Ohio, Florida, Pennsylvania, and Indiana, which had made plans to continue this outreach into rural and urban low-income areas. Id. at 12-13.

The provision of credit union services to small business and low-income groups is of such importance that if the Court were not inclined to grant a full stay of the district court's injunction, it nevertheless should broaden the current stay to permit federal credit unions to add small businesses (of fewer than 500 employees) and low-income groups (as defined by the NCUA) to their fields of membership.

C. Any Harm To Plaintiffs' Member Banks Due To The Issuance Of A Stay Will Be Minimal.

In contrast to the substantial harm that credit unions, potential members, and sponsoring employers will suffer in the absence of a complete stay, the issuance of a stay should not

[4] The testimony refers to 76 federal credit unions that had been granted authority to open branches in distressed

"substantially injure" plaintiffs or the ABA's institutional member banks during the limited time involved. See Hilton, 481 U.S. at 776. As noted in our previous papers, plaintiffs have alleged at most that, without preliminary relief, continued competition from SEG credit unions will erode the current customer base of their member institutions. See Pltfs. TRO Reply Mem. at 9. Even if plaintiffs had substantiated their assertions of "competitive injury" (which we vigorously dispute) the continued enrollment of members from previously approved SEGs, or even the addition of new SEGs, pending Supreme Court review would scarcely have an impact on the financial health of the American banking industry.

The relative size of this vast industry, as juxtaposed against the credit union industry, itself demonstrates how insubstantial any competition from new credit union membership could be. As of June 1996, the assets of all federally-insured banks and thrifts totalled approximately five trillion dollars; those of all federally-insured credit unions totalled $323.7 billion, and those of federal credit unions containing select employee groups totalled $150 billion. Affidavit of Wayne Winegarden, NAFCU Staff Economist at ¶ 5 (attached); Second Declar. of David Marquis (Oct. 8, 1996) at ¶ 5 (attached).

(..continued)
neighborhoods. The NCUA has since determined that the figure is 73.

The asset growth of the banking industry over the last fifteen years, while NCUA's multiple group policy was in effect, also suggests that any competitive harm will be minimal: from 1982 to 1996, the average assets of the banking industry increased $158.1 billion each year; the assets of all federal credit unions increased only by $159.8 billion over this entire fifteen-year period. Winegarden Aff. at ¶ 6. Where, as here, the district court's injunction will cause a loss of earnings and capital investment in the credit union industry, and where there is no evidence that a full stay would threaten the profits of plaintiffs of the ABA's institutional members, the balance of equities clearly favors a stay pending appeal. See United States v. Western Electric Co., 774 F. Supp. 11 (D.D.C. 1991) (stay pending appeal of order permitting regional telephone companies to participate in new market was appropriate because stay did not significantly harm regional companies, whose primary business would remain profitable); cf. WMATC v. Holiday Tours, 559 F.2d at 843 n.3 ("The mere existence of competition is not irreparable harm, in the absence of substantiation of severe economic impact.") Indeed, plaintiffs' own behavior belies any threat of real, immediate harm: where their member banks waited 14 years to challenge the multiple group policy, they cannot now protest that a stay will cause them irreparable injury. Moreover, plaintiffs have failed to show that

any particular bank will suffer anything other than de minimis injury from the stay we seek.

Given the balance of equities, permitting federal credit unions to continue to add new select employee groups and enroll new members from previously approved employee groups by granting a full stay of the district court's October 25th injunction is appropriate.

CONCLUSION

For the foregoing reasons, defendants respectfully renew their request for a complete stay of the district court's October 25th order, pending the Supreme Court's final disposition of First National.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of March, 1997, I served the foregoing "Defendants' Renewed Motion -- Based on the Recent Grant of Certiorari -- for a Stay Pending Supreme Court Review" by causing two copies, except as otherwise noted, to be mailed, postage prepaid, to:

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ATTACHMENTS

1. First Declaration of David M. Marquis

2. Second Declaration of David M. Marquis

3. Third Declaration of David M. Marquis

4. Affidavit of Wayne Winegarden

5. Testimony of Norman E. D'Amours, Chairman, NCUA, before the Subcomm. on Fin. Insts. and Consumer Credit of House Comm. on Banking and Fin. Servs. (Feb. 26, 1977)

A D D E N D U M

1. Memorandum and Order, First Nat'l Bank & Trust Co. v. NCUA, Nos. 90-2948 & 96-2312 (D.D.C. Oct. 25, 1996)

2. Memorandum and Order, First Nat'l Bank & Trust Co. v. NCUA, Nos. 90-2948 & 96-2312 (D.D.C. Oct. 31, 1996)